

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)

Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-98

Interconnection between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers,)

CC Docket No. 95-185

DOCKET FILE COPY ORIGINAL

To: The Commission

MOTION FOR STAY
OF THE
SOUTH DAKOTA PUBLIC SERVICE COMMISSION

I. INTRODUCTION

Pursuant to section 1.43 of the Commission's Rules, 47 C.F.R. § 1.43, the South Dakota Public Service Commission ("South Dakota") hereby moves for a stay, pending judicial review, of the effectiveness of certain rules adopted by the Commission in the First Report and Order, released August 8, 1996, in the above-captioned case. South Dakota specifically requests a stay of rules contained in subparts F, G and H of the Commission's Part 51 rules, which require South Dakota to follow pricing methodologies prescribed by those rules in carrying out its responsibilities under section 252 of the Telecommunications Act of 1996¹ ("The Act").

¹ South Dakota has identified the following specific rules that prescribe and impose a specific pricing methodology on South Dakota: sections 51.501, 51.503, 51.505 51.507, 51.509,

South Dakota is a state commission subject to the provisions of the Act. South Dakota participated in the rulemaking proceedings that preceded the First Report and Order. Pending before South Dakota are petitions for arbitration under section 252 of the Act. South Dakota therefore has standing to seek a stay.

II. ARGUMENT

As the Commission recognized in its recent Order denying the stay motions filed by certain local exchange carriers ("LECs"), the legal criteria for a stay are well settled. The proponent must show: (1) the failure to stay the effectiveness of the rules will cause irreparable harm; (2) other parties will not be harmed by a stay; (3) the public interest favors a stay; and (4) there is a likelihood of success on the merits of an appeal.² The Commission found that the LECs' motion to stay the effectiveness of the Commission's interconnection rules did not satisfy these legal criteria. The Commission's Order, however, does not address the legal criteria in terms of their effect on state commissions.

In its Order, the Commission cited special circumstances in this case. The Commission observed that "state-supervised

51.511, 51.513, 51.515, 51.605, 51.607, 51.609, 51.611, 51.705, 51.707, 51.709, 51.711 and 51.715.

² Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Order, released September 17, 1996 ("Order").

arbitrations that are now underway will be completed before the end of the year, because Congress established strict timetables to govern the...arbitration process."³ The Commission further observed that "Congress made clear that it wants our rules to be in place at this critical time."⁴ In addition, the Commission concluded that "the arbitrations cannot be completed on the timetable established by Congress -- with the arbitrators ensuring that the agreements reflect the regulations prescribed by the Commission, as Congress directed in section 252(c)(1) -- if the regulations are stayed."⁵

The Commission's Order correctly states the special circumstances applicable to the case. South Dakota agrees that these special circumstances are relevant to the disposition of a stay request. However, insofar as the Commission's pricing rules are concerned, the special circumstances warrant the grant of a stay. Such of the Commission's rules implementing section 251 of the Act as are lawful should remain in effect, as contemplated by Congress. But the Commission's pricing rules, which implement section 252 of the Act, should be stayed. Nothing in the Act makes it at all clear that Congress intended FCC pricing rules to be imposed on state commissions in their arbitration of interconnection rate issues.

³ Id. at 3; see, Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 760, 763 (D.C. Cir. 1958).

⁴ Order at 12.

⁵ Id. at 13.

A. The Commission's Failure to Stay the Effectiveness of its Pricing Rules will Irreparably Harm Competition

The First Report and Order correctly recognizes that a primary goal of the Act is to promote competition in the provision of local telecommunications services. The Commission has concluded that the imposition of its pricing rules on state commission arbitrations of interconnection agreements promotes competition. In fact, however, the Commission's failure to stay the effectiveness of those rules will irreparably harm competition.

Absent a stay, South Dakota will follow the Commission's pricing rules as required by law. In consequence, rates for services in interconnection agreements will be based on the Commission's pricing rules. But competitors would have no assurance that those rates would remain effective. Only a final adjudication of the lawfulness of the Commission's rules could provide such an assurance. Hence, competitors entering into agreements based on rates required by the Commission's rules are unlikely to make any significant commitment to competition pending judicial review of the Commission's rules. The loss to the public from the delay in competition is an irreparable harm. There is no remedy for lost time.

In contrast, with a stay of the Commission's pricing rules, South Dakota would arbitrate pricing issues in accordance with the pricing standards established by section 252(d) of the Act. South Dakota might use the FCC's pricing methodology as guidance

in carrying out the mandate of section 252(d) of the Act. South Dakota might also use another methodology consistent with the statutory standards.

In any case, South Dakota arbitration decisions would be based on the statutory standards rather than dictated by the Commission's rules. If South Dakota were to use the FCC rules as guidance for its decisions, competitors would have enough assurance that arbitrated interconnection rates would remain valid regardless of the outcome of judicial review, and would have no reason to delay their entry. Even if South Dakota departed significantly from the FCC's pricing rules, but acted consistent with the statutory pricing standards, and competitors found the resulting rates economically acceptable, competitors would have no reason to delay entry pending judicial review.

In short, failure to stay the Commission's pricing rules will irreparably harm competition because it will necessarily delay entry by competitors subject to arbitrated interconnection agreements dictated by those rules. A stay would release South Dakota from the legal obligation to follow the FCC's pricing rules. South Dakota would then necessarily act in accordance with the section 252(d) pricing standards in arbitrating disputes over rates in interconnection agreements. Arbitration decisions made in this manner, pending judicial review of the FCC's pricing rules, will promote the Congressional goal of competition.

B. A Stay of the Effectiveness of the Commission's Pricing Rules Will Not Harm Other Parties

In enacting section 252, Congress recognized the possibility that voluntary negotiation of interconnection agreements might fail. In the Order, the Commission implies that its pricing rules must remain in place to redress an imbalance in negotiating power between an LEC and a new entrant, and that new entrants would be harmed by a stay.⁶ Congress, however, provided new entrants who conclude they are unable to negotiate a reasonable agreement with an effective remedy. That remedy is state commission arbitration of unresolved issues, including arbitration of pricing issues in accordance with the standards set forth in section 252(d).

Although a number of potential competitors have opposed a stay of the Commission's pricing rules, such opposition proves only that those potential competitors favor the pricing rules. It does not prove that harm to others would result from a stay. If a stay is granted, the potential competitors would be protected by the statutory pricing standards and the arbitration process.

C. A Stay of the Effectiveness of the FCC's Pricing Rules Will Not Harm the Public Interest

The public interest clearly will not be harmed by a stay. Indeed, the public interest in competitive entry without delay will be served by a stay. States will act to determine rates in accordance with the statutory pricing standards in arbitration

⁶ Id. at 7.

proceedings. Those actions will provide a far greater degree of certainty to potential competitors than decisions dictated by Commission pricing rules that are still subject to judicial review. State action in accordance with the statutory pricing standards will, by definition, promote the public interest in the competition objective adopted by the Congress.

D. There is Enough Likelihood that the Commission's Pricing Rules Will Not Survive Judicial Scrutiny to Justify a Stay.

In the Order, the Commission addressed the final legal criterion for a stay by reference to its discussion in the First Report and Order of its authority to adopt pricing rules and the bases for its choice of pricing methodology. In effect, the Commission expressed confidence that its pricing rules would be upheld on judicial review. It also rejected specific LEC attacks on its default proxy price ceilings and ranges.⁷

In order to satisfy the last stay criterion in this case, it is not necessary that the Commission be convinced that there is a strong likelihood that its pricing rules will be overturned on judicial review. Under the three former criteria, as South Dakota has shown, the equities favor a stay. Thus, South Dakota need only show that there is a substantial question as to the lawfulness of the Commission's pricing rules. As the Eighth Circuit has held, "...where the movant has raised a substantial

⁷ Id. at 9-11.

question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less."⁸

There is a substantial question as to the lawfulness of the Commission's rules. The Commission's basis for jurisdiction is novel, by definition, because it is based on the language of a new statute that neither the Commission nor any court has previously interpreted. The Commission also relies in major part on the novel theory that the rulemaking authority conferred by section 251 to implement that section of the statute incorporates rulemaking authority in respect to section 252. Yet section 252 confers no independent authority on the FCC to make rules. Moreover, the Commission's imposition of pricing rules on state commissions in respect to their regulation of intrastate telecommunications services is unprecedented.²

In addition, the Commission has chosen a pricing methodology based on long run incremental costs. That is a novel step for the FCC. The Commission examined and rejected such a cost basis for determining the reasonableness of AT&T's interstate service rates more than a decade ago.¹⁰

The foregoing facts, at minimum, show that there is a substantial question as to whether the Commission's pricing rules

⁸ Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981); see also, Washington Metropolitan Area v. Holiday Inns, 559 F.2d 841 (D.C. Cir. 1972).

² Cf., Louisiana Public Service Com'n v. FCC, 476 U.S. 355 (1986).

¹⁰ See, Aeronautical Radio, Inc. v. FCC, 640 F.2d 1221, 1226 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

will prevail on appeal. This demonstration is sufficient to satisfy the final criterion for a stay in the circumstances of this case.

III. CONCLUSION

For the foregoing reasons, the Commission should issue a stay for South Dakota of the effectiveness of those sections of its Part 51 pricing rules specified herein.

Dated: September 23, 1996

Respectfully submitted,

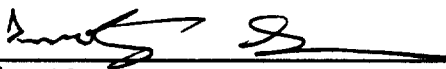


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I hereby certify that on this 23rd day of September, 1996, I caused copies of the Motion for Stay to be served upon the parties listed on the attached service list by first-class mail, postage prepaid.



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